Supreme Court, U.S.
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No. 98-1646

IN THE

Supreme Court of the United States

VICKY BRAWNER-AHLSTROM,

Petitioner,

v.

ROBERT J. HUSSON, GARY PON and JAMES WALL,

Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Colorado Court of Appeals, in accordance with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), correctly held that Petitioner, after establishing a *prima facie* case of discrimination, and after Respondents advanced a legitimate non-discriminatory reason for the adverse employment action, was required to offer credible evidence that the proffered reason was a pretext for unlawful discrimination in order to survive summary judgment?

2. Whether the Colorado Court of Appeals, in using the analytical framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), correctly held that Petitioner, after establishing a *prima facie* case of discrimination, and after Respondents advanced a legitimate, non-discriminatory reason, was required to proffer credible evidence that Respondents' reason was a pretext for unlawful discrimination, rather than rest solely on evidence that established Petitioner's *prima facie* case?

3. Whether the Colorado Court of Appeals correctly held that Petitioner's sole evidence of pretext, by way of her affidavit, in which she alleged that her performance evaluations were exemplary, and that she was treated differently than male employees, raised a genuine factual issue as to whether Respondents' proffered reason was pretextual in light of Respondents' specific, reasonable and credible evidence that Petitioner was terminated for job abandonment.

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Statute:

42 U.S.C. § 1983 1

Respondents, Robert J. Husson, Gary Pon, and James Wall (collectively "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of Colorado Court of Appeals in this case.[1] That opinion is reported at 969 P.2d 738 (Colo. App. 1998).

STATEMENT OF THE CASE

Petitioner commenced suit against her former supervisors, Respondents, Robert Husson, James Wall and Gary Pon, in the District Court for the City and County of Denver alleging that they terminated her employment with the Colorado Compensation Insurance Authority ("CCIA") because of her gender, in violation of 42 U.S.C. § 1983. Despite Petitioner's assertions, she failed to proffer any credible evidence that gender played a role in her termination. In fact, the record evidence indicates that Petitioner was employed by CCIA as a mailroom supervisor from 1988 until May 12, 1993 when her employment was terminated for the sole reason that she failed to report to work, and thus abandoned her job.

Petitioner's claim is predicated on her assertion that her knowledge of an intimate relationship existing between Robert Husson and a former CCIA employee set in motion a chain of events that led to her demotion and ultimate termination because of her gender. The record evidence, however, belies Petitioner's assertions, and undeniably

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1. The Petition for Certiorari filed by Petitioner, Vicky Brawner-Ahlstrom ("Petitioner" or "Brawner-Ahlstrom") will be referred to herein as the "Petition" and cited to as "Pet." The Petitioner's Appendix will be cited to as "Pet.'s App."

shows that Petitioner's termination had absolutely nothing to do with her gender.

The record indicates that in June 1992, a fellow female mailroom supervisor approached Petitioner after one of the mailroom clerks had opened a personal letter addressed to Robert Husson, who was then the vice president of CCIA's benefits and claims administration. The letter revealed that Husson had engaged in an intimate relationship with a former employee. After reading the letter, Petitioner took the letter to her immediate supervisor, Respondent, James Wall. Wall instructed Petitioner to staple the letter together and give it to Husson, and warned Petitioner not to discuss the matter with anyone. Husson told Pon, who was then CCIA's president and general manager, about the letter.

Although Petitioner alleges that Wall and Husson began to treat her in a negative fashion after the incident, the record evidence reveals no disparate treatment. On the contrary, seven months after the incident, in December 1992, Wall prepared and delivered to Petitioner a performance review in which he rated her overall performance as "exceeds expectations." In fact, in some categories, Wall rated Petitioner's performance as "excellent."

In April 1993, over ten months after the incident involving the letter occurred, an employee under Petitioner's supervision complained to Wall about Petitioner's management style. Specifically, Petitioner's subordinates complained about Petitioner's excessive favoritism toward some employees, misuse of compensatory time, and failure to abide by company rules and procedures. Contrary to Petitioner's assertions to this Court, none of the complaints

concerned Petitioner's involvement with respect to Husson's letter, and none of the complaints were initiated by or even at request of the Respondents. Pet. at 6.

In response to the complaints, CCIA's human resources department conducted an investigation that entailed interviewing nineteen employees in Petitioner's department to determine if any of the complaints had a factual basis. The Respondents had no role whatsoever in the investigation. They were neither interviewed, nor consulted regarding the investigation.

In April 1993, the human resources department issued a report in which it concluded that Petitioner had failed to effectively manage her department, and in fact, had committed serious violations of company policies that exposed CCIA to liability. The human resources department found numerous incidents of mismanagement and misconduct. It determined that Petitioner had offered her own prescriptions of Valium to her employees; had inappropriately shared confidential information regarding case settlements involving a workers compensation claim at a group meeting; had erroneously interpreted company policy so as to leave employees unsupervised; and had failed to act upon complaints that an employee came to work intoxicated, falsified documents, slept on-the-job, and had stolen food.

Petitioner admitted to Wall that a number of the complaints were true. Moreover, Petitioner has never adduced any evidence that would refute the conclusions of the human resources department. Nor has she proffered evidence, other than her unsupported assertions, that Respondents had any involvement in initiating the

complaints or conducting and/or influencing the outcome of the investigation. Petitioner's assertions to this Court that she produced evidence that the investigation was biased and served only as a justification to fire her because of her gender is patently false. Pet. at 6. In reality, no evidence supports Petitioner's allegation that either the investigation, or its conclusions were unfounded, or that Respondents terminated her because she is a female.

As a result of Petitioner's admitted mismanagement and violations of company policies, Wall concluded that Petitioner could not continue in her management position. Recognizing Petitioner's ten-year history with CCIA, Wall offered to allow Petitioner an opportunity to temporarily complete a transitional assignment, and thereafter transfer to another position within CCIA in lieu of termination. Petitioner never accepted Wall's offer. Following Wall's offer, Petitioner exhausted her medical leave, and thereafter failed to return to work despite being certified by her physician as being fit to return to work. Although Petitioner was asked by CCIA to return to work, she never did. On May 12, 1993, CCIA terminated Petitioner because she abandoned her job. Although Wall was involved in the decision to terminate Petitioner, contrary to Petitioner's assertions that Respondents fired her, neither Husson, nor Pon, participated in or were even aware of the decision. Pet. at 6.

SUMMARY OF THE ARGUMENT

1. The Colorado Court of Appeals decision that Petitioner, after establishing a *prima facie* case of discrimination, and after Respondents advanced a legitimate, non-discriminatory reason for the adverse employment action, was required to offer credible evidence of pretext, is consistent with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Because the decision of the Colorado Court of Appeals is completely consistent with the analytical framework established by this Court over two decades ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), there is no reason why this Court should review the decision.

In *McDonnell Douglas*, this Court established the allocation of the burden of production and the order for the presentation of proof in disparate treatment cases which calls for the plaintiff to initially establish a *prima facie* case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he was qualified and applied for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. Once the plaintiff meets this initial burden, a presumption exists that the

employer discriminated against the plaintiff. *Id.* In order to rebut that presumption, the employer may produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer does so, the presumption falls away. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). Plaintiff must then be given a full and fair opportunity to demonstrate that the stated reason is a pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802. It is incumbent upon a plaintiff to raise a genuine factual issue as to whether the articulated reason is pretextual. Plaintiff bears the ultimate burden of convincing the trier of fact that defendant intentionally discriminated against her. *Burdine*, 450 U.S. at 253.

The decision of the Court of Appeals accurately follows *McDonnell Douglas* and *St. Mary's Honor.* The Court of Appeals found that Petitioner met the relatively light burden of establishing a *prima facie* case by establishing that she is a member of a protected class, that she was qualified for the position at issue, and that she suffered an adverse employment decision. Pet. App. A at 4-6. The Court of Appeals, however, reviewing the record in the light most favorable to Petitioner, held that in the face of a "specific, reasonable and sufficient" reason offered by Respondents, Petitioner's failure to produce any evidence that Respondents' reason was a pretext for sex discrimination was fatal to her claim. Pet.'s App. A at 8. Simply put, Petitioner never set forth evidence that called into question Respondents' reason, and thus never established pretext. The Court of Appeals properly granted Respondents summary judgment.

Petitioner's appeal is based on an erroneous interpretation of *St. Mary's Honor* that is neither shared by

this Court, nor any of the circuit courts of appeal. Petitioner claims that she should be allowed to establish pretext simply by referring to the evidence that established her *prima facie* case, even though that evidence fails to establish a genuine factual dispute as to whether Respondents' reason is pretextual. Neither *St. Mary's Honor*, nor the cases cited by Petitioner stand for this proposition. In *St. Mary's Honor*, this Court held that the fact-finder's disbelief of an employer's reason may, together with the elements of a *prima facie* case, establish intentional discrimination. That disbelief, however, occurs after plaintiff establishes pretext. The plaintiff is still charged with the responsibility of coming forth with evidence that creates a factual dispute as to whether the stated reason is in fact pretextual. *St. Mary's Honor*, 509 U.S. at 511. Petitioner never did in this case.

2. The Colorado Court of Appeals' decision that Petitioner, after establishing a *prima facie* case of discrimination, and after Respondents advanced a legitimate, nondiscriminatory reason, was required to offer evidence of pretext, and not simply rest on evidence establishing her *prima facie* case is consistent with *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

The Court of Appeals correctly required Petitioner to demonstrate a genuine issue of material fact as to whether Respondents' stated reason for her discharge was pretextual. Contrary to Petitioner's assertions, the Court of Appeals did not require Petitioner to produce evidence above and beyond pretext. Petitioner misconstrues the Court of Appeals requirement that she establish a genuine issue of material fact regarding Respondents' articulated reason for the adverse employment action as a requirement that

Petitioner produce evidence *in addition* to pretext. Although Petitioner argues that evidence that established her *prima facie* case of discrimination can serve as evidence of pretext, Petitioner ignores the fact that none of the evidence that she presented called into question Respondents' stated reason for terminating her employment. Petitioner's evidence, therefore, was insufficient to create a factual dispute.

The Court of Appeals decision not only complies with *McDonnell Douglas* and *St. Mary's Honor*, but has also been echoed by other circuit courts of appeal. *See Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (plaintiff must raise genuine factual issue as to whether articulated reason was pretextual in order to defeat summary judgment); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995) (intent is a permissible inference only if plaintiff establishes a *prima facie* case and proof of pretext); *Fuentes v. Perske*, 32 F.3d 759 (3rd Cir. 1994) (holding that plaintiff may defeat a motion for summary judgment by either discrediting the proffered reasons or adducing evidence, either circumstantially or directly that discrimination was the motivating factor in the adverse employment action); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1317 (4th Cir. 1993) (holding that plaintiff must establish a *prima facie* case and "a genuine factual dispute over the employer's legitimate, nondiscriminatory reason to defeat summary judgment").

3. The Colorado Court of Appeals' decision correctly held that Petitioner's evidence failed to create a factual dispute as to whether Respondents' articulated reason for discharging Petitioner was pretextual.

As the Court of Appeals held, Petitioner failed to produce a scintilla of evidence that her gender played a role in her discharge. Pet. App. A at 9. Petitioner points solely to evidence that she received exemplary performance evaluations and that she was treated differently than Respondents as proof of pretext. Pet. Questions Presented for Review at i. Petitioner ignores, however, that none of her evidence was reasonably calculated to refute Respondents' explanation that Petitioner was demoted because of mismanagement unrelated to her involvement with Husson's letter, and that she was discharged for abandoning her job. No evidence establishes that it is more likely than not that Petitioner was discharged because she is female.

Because the decision of the Colorado Court of Appeals complies with this Court's holdings as well as the decisions of the eleven circuit courts of appeal, this Court should deny Petitioner's Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COLORADO COURT OF APPEALS THAT PETITIONER WAS REQUIRED TO OFFER CREDIBLE EVIDENCE OF PRETEXT IN ORDER TO SURVIVE SUMMARY JUDGMENT IS IN HARMONY WITH *ST. MARY'S HONOR CENTER v. HICKS*, 509 U.S. 502 (1993).

Petitioner's appeal is erroneously based on her tortured reading of the decision of the Court of Appeals that "evidence of pretext does not create an inference of

discrimination and that pretext alone is insufficient to defeat summary judgment where the employer has offered a facially legitimate, nondiscriminatory explanation for the discharge." Pet. at 9. In reality, the Court of Appeals never held that evidence of pretext does not create an inference of discrimination or that evidence of pretext can not defeat summary judgment. Pet. App. A at 8-9. The Court of Appeals properly followed the mandate established by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 508 U.S. 506 (1993), and held that although Petitioner established a *prima facie* case, she failed to produce a "scintilla of evidence that her sex played a role in her dismissal." Simply put, at the stage in the litigation when no presumptions existed, Petitioner failed to adduce any facts that would create a genuine issue of material fact as to whether Respondents' reasons were a pretext for sex discrimination.

The Court of Appeals' decision is in harmony with this Court's holdings in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 508 U.S. 506 (1993). In *McDonnell Douglas*, this Court held that the plaintiff in a disparate treatment discrimination case has the initial burden of establishing a *prima facie* case by showing:

> (i) that he belongs to a racial minority; (ii) that he was qualified and applied for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. Once the plaintiff meets this initial burden, a presumption exists that the employer discriminated against the plaintiff. *Id.* In order to rebut that presumption, the employer may produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer does so, the presumption falls away. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The "factual inquiry thereafter proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. Plaintiff must then be given a full and fair opportunity to demonstrate that the stated reason is a pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802. If plaintiff fails to prove pretext, the employment action must stand. *Id.* at 804.

Twenty years after *McDonnell Douglas*, this Court further "[s]harpened the inquiry into the elusive factual question of intentional discrimination" *Burdine*, 450 U.S. at 255, n.8, in *St. Mary's Honor Center v. Hicks*, 508 U.S. 506 (1993). In *St. Mary's Honor*, this Court addressed whether a plaintiff was entitled to judgment as a matter of law once he established a *prima facie* case of discrimination, coupled with evidence that the employer's articulated reason was pretextual. This Court held that the trier of fact's rejection of the employer's asserted reason does not entitle plaintiff to judgment as a matter of law. Instead, plaintiff must establish that the employer's reason was not only false, but that it was also evidence of unlawful discrimination. *St. Mary's Honor*, however, does not, as Petitioner asserts, stand for the proposition that a plaintiff can satisfy her burden by resting on evidence that established her *prima facie* case where that evidence fails to call into question the reason proffered by the employer, and therefore, fails to establish pretext.

Petitioner relies principally on this Court's statement in *St. Mary's Honor* that "[T]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination, and . . . '[n]o additional proof of discrimination is required.' " Petitioner, however, misconstrues this Court's statement to mean that she need not produce evidence of pretext. Petitioner can only get to the stage in the litigation in which the factfinder disbelieves the employer, however, by creating a factual dispute as to whether the stated reasons are believable, or, in other words, pretextual. Nothing in *St. Mary's Honor* relieves Petitioner of this burden.

The rule urged by Petitioner is that a plaintiff in a disparate treatment lawsuit should be able to defeat summary judgment by simply showing a *prima facie* case. An employer's legitimate, nondiscriminatory reasons for the adverse employment action should be presumed false, even though plaintiff can neither raise a factual question, nor present evidence that the employer's reason for the adverse action was pretextual. Petitioner's arguments have no basis whatsoever in the law, and contrast sharply with the interpretation of the law in the eleven circuit courts of appeals. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (holding that the mere existence of a *prima facie* case does not preclude summary judgment); *Davis v. Chevron U.S.A.*, 14 F.3d 1082, 1087 (5th Cir. 1994) (upholding summary judgment against plaintiff where plaintiff failed to present more than a mere refutation of the employer's articulated reason for not hiring plaintiff); *Durhan v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994) (upholding summary judgment where plaintiff failed to offer

evidence to support a finding that the employer's articulated reason was pretextual); *Anderson v. Baxter Healthcare Group*, 13 F.3d 1120, 1124 (7th Cir. 1994) (requiring plaintiff to produce evidence from which a rational factfinder could infer that the employer lied); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (requiring evidence that created a factual dispute about the employer's nondiscriminatory reason); *Geary v. Visitation of the Blessed Virgin Mary*, 7 F.3d 324, 332 (3rd Cir. 1993) (summary judgment upheld where plaintiff failed to offer facts that showed a genuine issue of fact concerning the employer's articulated reason); *LeBlanc v. Great American Insurance*, 6 F.3d 836, 843 (1st Cir. 1993) (requiring evidence sufficient for factfinder to reasonably conclude discriminatory motive, *cert denied*, 511 U.S. 1018 (1994).

II.

THE COURT OF APPEALS' DECISION THAT PETITIONER WAS REQUIRED TO OFFER PROOF OF PRETEXT RATHER THAN REST ON EVIDENCE THAT ESTABLISHED HER *PRIMA FACIE* CASE IS CONSISTENT WITH *ST. MARY'S HONOR CENTER v. HICKS*, 509 U.S. 502 (1993).

The Court of Appeals correctly required Petitioner to demonstrate a genuine issue of material fact as to whether Respondents' stated reason for her discharge was pretextual. Contrary to Petitioner's assertions to this Court, the Court of Appeals did not require Petitioner to produce evidence above and beyond pretext. Although Petitioner argues that evidence that established her *prima facie* case of discrimination can serve as evidence of pretext, Petitioner ignores the fact that none of the evidence that she presented

called into question Respondents' stated reason for terminating her employment. In fact, the record indicates that Petitioner's sole evidence rebutting Respondents' reason was that she received exemplary performance evaluations in the past, and that she was treated differently than Respondents. Petitioner, however, ignores the fact that no evidence points to the Husson letter or her gender as being even remotely connected with her termination. In fact, Petitioner failed to rebut compelling evidence that she was demoted because of management style, and her failure to abide by company policies and procedures, and that she was terminated because she failed to report to work. Petitioner failed to adduce any evidence that similarly situated males who violated the same company policies were treated differently. Given Petitioner's total lack of evidence creating a factual controversy, the Court of Appeals correctly entered summary judgment for the Respondents.

Other courts, like the Court of Appeals, have held that where plaintiff fails to present evidence rebutting the employer's reason, and thus failing to establish pretext, summary judgment is warranted. *See Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) (plaintiff must raise genuine factual issue as to whether articulated reason was pretextual in order to defeat summary judgment); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995) (intent is a permissible inference only if plaintiff establishes a *prima facie* case and proof of pretext); *Fuentes v. Perske*, 32 F.3d 759 (3rd Cir. 1994) (holding that plaintiff may defeat a motion for summary judgment by either discrediting the proffered reasons or adducing evidence, either circumstantially or directly that discrimination was the motivating factor in the adverse employment action); *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1317 (4th Cir. 1993) (holding that

plaintiff may defeat summary judgment by establishing a *prima facie* case and "a genuine factual dispute over the employer's legitimate, nondiscriminatory reason.")

III.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S PROFFERED EVIDENCE OF PRETEXT WAS INSUFFICIENT TO CREATE A FACTUAL DISPUTE.

Finally, Petitioner argues that she proffered evidence sufficient to rebut Respondents' articulated reason for her discharge. However, the only evidence Petitioner offered was that she received exemplary performance evaluations prior to her discharge, and that she was treated differently than similarly situated males who were involved in the Husson letter incident.

The Court of Appeals found that Respondents offered affidavits and documentary evidence that included a summary of the investigation of Petitioner's performance, correspondence from Respondents requesting that Petitioner return to work, and documents indicating that Petitioner was terminated because she failed to return to work. Pet.'s App. A at 9. In response, Petitioner simply reiterated by affidavit that she received exemplary performance appraisals and she was treated differently than the Respondents. She failed, however, to show that she was treated differently from similarly situated males. Although Petitioner alleged that the males involved in the Husson letter incident were not punished, she ignores the fact that she was not terminated for events arising out of the incident. Moreover, she failed to produce any evidence that her

gender had anything to do with her termination. None of Petitioner's evidence was sufficient to raise doubts about Respondent's articulated reasons. The Court of Appeals, therefore, dismissed Petitioner's case on summary judgment.

Other courts that have addressed this issue have, like the Court of Appeals, held that a plaintiff's evidence must be more than a mere recitation of naked allegations to refute an employer's articulated reason. In fact, courts have required plaintiffs to establish evidence upon which a factfinder could conclude that the employer's reason was pretextual. *See Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) (plaintiff must produce evidence that raises a genuine factual issue as to whether articulated reason was pretextual in order to defeat summary judgment); *Cone v. Longmont United Hosp. Assn.*, 14 F.3d 526 (10th Cir. 1994) (summary judgment upheld where plaintiff offered vague and unsubstantiated facts to rebut employer's reasons).

CONCLUSION

Petitioner has failed to identify any legitimate reason why this Court should review the Colorado Court of Appeals' decision. Accordingly, Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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